U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10856917

Date: SEPT. 22, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as a database administrator under the second-preference, immigrant classification for members of the professions with advanced degrees or their equivalents. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

After the petition's initial grant, the Director of the Nebraska Service Center revoked the petition's approval. The Director concluded that, because the Petitioner interviewed the Beneficiary for the offered position before the position was publicly advertised, the offered position was not a *bona fide* job opportunity open to U.S. workers. The Director found this to be "a material misrepresentation/omission of the facts."

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will withdraw the decision of the Director. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id.* Labor certification also indicates that the employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

Section 205 of the Act, 8 U.S.C. § 1155, provides that the Secretary of Homeland Security may "for good and sufficient cause, revoke the approval of any petition." By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a). USCIS must give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. *See* 8 C.F.R. § 205.2(b) and (c). A notice of intent to revoke (NOIR) "is not properly issued unless there is 'good and sufficient cause' and the notice includes a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Per *Matter of Estime*, "[i]n determining what is 'good and sufficient cause' for the issuance of a notice of intention to revoke, we ask whether the evidence of record at the time the notice was issued, if unexplained and unrebutted, would have warranted a denial based on the petitioner's failure to meet his or her burden of proof." *Id.*

II. *BONA FIDE* JOB OPPORTUNITY

In this case, the accompanying labor certification was filed on April 5, 2016. The labor certification states that the Petitioner publicly advertised the job opportunity of database administrator from November 2015 to January 2016.

Following the approval of the petition, the Beneficiary was interviewed abroad for an immigrant visa. During the interview, the Beneficiary stated that an acquaintance referred her to the Petitioner in May 2015, and that the Petitioner twice interviewed her for the database administrator position, in July and October 2015.

The Director issued a NOIR, stating that it had come to the attention of USCIS that "the position appears to have been created specifically for the Beneficiary and was not available to U.S. workers."[1] The Director noted that the Petitioner did not publicly advertise for the position until November 2015, after it had already interviewed the Beneficiary.

The Petitioner responded to the NOIR with an affidavit from its president. In his affidavit, the Petitioner's president states that the Beneficiary was initially interviewed in July 2015, but he decided not to hire her due to the length of time it would take to process her immigrant visa. The Petitioner's president further states that, after an unsuccessful search for a candidate the Beneficiary was interviewed again in October 2015 and a decision was made to publicly advertise the position. The Petitioner's president states, "we placed a job order, newspaper advertisement and company website advertisement. … [W]e could not find the right person so we mailed a job offer letter to [the Beneficiary] on January 20, 2016." In support of these statements, the Petitioner submitted a copy of the Beneficiary's January 20, 2016, offer of employment letter, and a statement from the Beneficiary corroborating the Petitioner's president's statement.

After receiving the Petitioner's response to the NOIR the Director revoked the petition's approval. The Director found that the Petitioner "has not provided sufficient documentary evidence that

[1] The petitioner has the burden of establishing that a *bona fide* job opportunity exists when it is asked to show that the job is clearly open to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); *see also* 8 U.S.C. § 1361; 20 C.F.R. § 656.17(l).

corroborates the position was not created for the Beneficiary and was open to U.S. workers in the form of area newspaper and company website advertisements."

On appeal the Petitioner submits a brief from counsel. In his brief, counsel provides a description of the DOL's labor certification process before March 28, 2005 and asserts that under the previous system, recruitment for able, willing, qualified, and available U.S. workers would not begin until the labor certification specifically identifying a foreign worker was filed with the DOL.[2] Counsel compares the previous process to the current process, asserting that "it is presumed that [the petitioner] already tentatively offered the position [to a foreign worker] before the procedure begins." We agree.

Because of the design of the labor certification process, every petitioner who files a labor certification has already identified a foreign national that they wish to hire prior to the required recruitment. The Petitioner's identification of the Beneficiary prior to the required recruitment, or even its employment of the Beneficiary in the offered job, does not indicate that the job is not open to U.S. workers. Rather, it indicates that the Petitioner followed DOL regulations in advertising for the job opportunity after identifying a foreign national for the position. *See, e.g.,* 20 C.F.R. § 656.17. Thus, the Director erred in revoking the approval of the petition for lack of a *bona fide* job opportunity solely due to the Petitioner's identification of the Beneficiary as an applicant prior to the commencement of the labor certification recruitment process. The Petitioner has established by a preponderance of the evidence that the job opportunity is *bona fide*. We will therefore withdraw the Director's decision on the issue of *bona fide* job opportunity and material misrepresentation.

III. ABILITY TO PAY

Although not discussed by the Director, the record does not contain regulatory-required evidence of the Petitioner's ability to pay the proffered wage of $69,514 per year, from the priority date on April 5, 2016, and continuing until the beneficiary obtains lawful permanent residence. The regulation at 8 C.F.R. § 204.5(g)(2) requires that "[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements."

The record does not contain regulatory-prescribed evidence of the Petitioner's ability to pay for 2016. Without this regulatory-required evidence, we cannot affirmatively find that the Petitioner has the continuing ability to pay the proffered wage from the priority date.

We note that where a petitioner has filed I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions). USCIS records show that the Petitioner has filed Form I-140 petitions for two other beneficiaries.[3] Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.

[2] The current regulations governing the pre-filing recruitment for labor certifications can be found at 20 C.F.R. § 656.17(e), (f).

[3] On the petition, the Petitioner lists its total number of employees as four. The Petitioner has filed Form I-140 petitions for another database administrator, and for a market research analyst with an offered wage of $89,315 per year.

Therefore, we will remand the matter to the Director to analyze the record and determine whether the Petitioner has established its ability to pay the proffered wage to this Beneficiary, and the beneficiaries of its other petitions, from the priority date onward. On remand, the Director should request such regulatory-required evidence and allow the Petitioner reasonable time to respond.

IV. CONCLUSION

Considering the above discussed deficiencies, we are withdrawing the Director's revocation and remanding the petition to allow the Petitioner an opportunity to address the additional deficiencies identified above. On remand, the Director may wish to issue a new NOIR outlining the deficiencies above, and allowing the Petitioner an opportunity to respond. The Director should consider any new evidence submitted and, if deficient, must state how the record fails to demonstrate eligibility for the classification sought under the pertinent regulatory scheme.

If the Director issues a new NOIR, the content of that notice and the consideration of any evidence submitted by the Petitioner should comply with the requirements of 8 C.F.R. § 205.2(b) and (c) and *Matter of Estime*. The Director shall then issue a new decision.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.